RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAR 10 2014
OFFICE OF THE CLERK

No. 22O141, Original

In The Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion for Leave to Intervene

TEXAS' RESPONSE IN SUPPORT OF MOTION OF THE UNITED STATES FOR LEAVE TO INTERVENE AS A PLAINTIFF

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March 2014

The State of Texas does not oppose, and in fact supports, the Motion of the United States for Leave to Intervene as a Plaintiff.

Respectfully submitted,

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RECORD AND BRIEFS

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

On Motion For Leave To Intervene

NEW MEXICO'S RESPONSE TO THE MOTION OF THE UNITED STATES FOR LEAVE TO INTERVENE AS A PLAINTIFF

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On February 27, 2014, the United States filed its Motion of the United States for Leave to Intervene as a Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as a Plaintiff. New Mexico does not oppose the Motion of the United States for Leave to Intervene insofar as the United States seeks leave to become a party to this proceeding on the existing pleadings. New Mexico objects, however, to the United States' proposed Complaint in Intervention as follows.

First, to the extent that the United States is attempting to inject a new issue of whether the sources of water for its water right in the Rio Grande Project include groundwater, *see* Complaint in Intervention ¶ 13, federal law mandates that the United States comply with state law in appropriating water rights and distributing water in the Project, 43 U.S.C. § 383. Federal law waives the United States sovereign immunity in state court for adequate state adjudications to determine the elements of the water rights for Reclamation projects. 43 U.S.C. § 666. The United States is required to adjudicate its water right in the Rio Grande Project in the current state adjudication court. *United States v. City of Las Cruces*, 289 F.3d 1170 (10th Cir. 2002) (affirming that the United States must adjudicate the Rio Grande Project water right in New Mexico state court). The adjudication court has already determined that the United States did not appropriate groundwater for the Project and that therefore groundwater is not a source of water for the Project. Order Granting the State's Motion to

Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment at 2-4, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District*, No. CV-96-888 (3rd Jud. Dist. Ct. Aug. 16, 2012), https://lrgadjudication.nmcourts.gov/index.php/overview/cat_view/18-stream-system-issues/17-ss-97-104.html.

Second, jurisdiction in this Court is dependent on the Texas Bill of Complaint, and the Court has allowed New Mexico to file a motion to dismiss in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. If the Court grants New Mexico's motion and dismisses Texas' Complaint, the United States Complaint in Intervention should also be dismissed. An adequate alternative forum – the United States federal district court – exists to resolve the claims related to the Rio Grande Project that the United States elects independently to pursue. *See South Carolina v. Regan*, 465 U.S. 367, 402 n.18 (1984) (O'Connor, J., concurring) ("where Congress expressly leaves open an alternative forum in which an original plaintiff can raise its claims, this Court will ordinarily presume that original jurisdiction is inappropriate"); *United States v. Nevada and California*, 412 U.S. 534, 538 (1973) ("We need not employ our original jurisdiction to settle competing claims to water within a single State.").

Third, the Complaint in Intervention fails to state a claim because it misconstrues the respective rights and obligations of the Bureau of Reclamation

and the states under the Reclamation Act. 43 U.S.C. §§ 371 et seq.

To address these, and other potential issues, New Mexico requests leave to file a motion to dismiss in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to challenge the claims raised by the United States in its Complaint in Intervention. The existing deadline for New Mexico to file its Motion to Dismiss the Texas Complaint is March 28, 2014. If the Court is inclined to grant New Mexico's request for leave to file a similar motion to dismiss the United States' Complaint in Intervention, New Mexico suggests that the matters be briefed and considered together, and that a deadline to move to dismiss both Complaints be set at thirty days from the date on which the Court issues its order on the United States Motion to Intervene. Such an extension would allow New Mexico to incorporate its argument to dismiss the Texas Complaint and the Complaint in Intervention in a single memorandum.

CONCLUSION

The United States' motion for leave to intervene as a plaintiff should be granted subject to the foregoing objections. New Mexico should be given leave to file a motion in the nature of a motion to dismiss the Complaint in Intervention. New Mexico suggests that judicial efficiency is served if New Mexico is given a thirty-day extension from the date the Court issues

its order on the Motion to Intervene to file a motion to dismiss the Texas Complaint together with its Motion to dismiss the United States' Complaint in Intervention so that the issues can be submitted and considered together. A letter requesting such an extension has been submitted to the Clerk of the Court.

Respectfully submitted,

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